No. 11751 2499

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. V. AMMANN, as Conservator for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

NOTICE OF HEARING AND MOTION AND APPLICATION FOR STAY FOR EXECUTION PENDING APPEAL.

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NOTICE OF HEARING OF MOTION AND APPLICATION FOR STAY OF EXECUTION PENDING APPEAL.

To: Paul Mallonee, C. H. Newhouse and Winnie Bucklin, Plaintiffs and Appellees Herein, and to Westover and Smith, Their Attorneys; and

Long Beach Federal Savings and Loan Association, Defendants and Third Party Plaintiffs, and to Charles K. Chapman, Its Attorney; and

Title Service Company, Defendant, Cross-Claimant in Interpleader and Third Party Plaintiffs, and to Thomas and Wallace, Their Attorneys; and

Robert H. Wallis, Defendant and Third Party Plaintiff, Defendant and Cross-Claimant in Interpleader, and to Raymond Tremaine, His Attorney; and

Federal Home Loan Bank of Los Angeles, Third Party Defendant and Cross-Complainant, and to O'Melveny & Myers, Its Attorneys, and Richard Fitzpatrick, Its Attorney; and

Federal Home Loan Bank of Portland, Third Party Cross-Defendant, and to Bishop & Hoffman, Its Attorneys:

You and each of you will please take notice that on Monday, November 10, 1947, at the hour of 10:00 o'clock a. m. or as soon thereafter as counsel may be heard, appellant A. V. Ammann as conservator of the Long Beach Federal Savings and Loan Association, through his attorneys, will move the above entitled Court at its Court Room on the sixteenth floor of the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, for an order staying execution pending appeal of the order of the District Court entered September 2, 1947, for interim partial allowance on account of expenses and attorneys' fees incurred by plaintiffs.

The motion will be made upon the grounds and based upon the material set forth in the motion and application for such stay of execution appended hereto and served herewith.

Dated this 9th day of October, 1947.

JAMES M. CARTER,
United States Attorney;

RONALD WALKER,
Assistant U. S. Attorney,
Attorneys for Appellant.

RAY E. DOUGHERTY,
Associate General Counsel
Home Loan Bank Board,
Of Counsel.

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. V. AMMANN, as Conservator for the LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellant,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

MOTION AND APPLICATION FOR STAY OF EXECUTION PENDING APPEAL.

The appellant, A. V. Ammann as conservator for the Long Beach Federal Savings and Loan Association, presents herewith his motion and application for a stay of execution pending appeal from that certain order of the District Court for the Southern District of California entered September 2, 1947, for interim partial allowance on account of expenses and attorneys' fees in the above entitled matter and as a basis for said application respectfully shows:

1. The instant application for the stay of execution is directly connected with and is in aid of this Court's appellate jurisdiction in the appeal herein and is necessary in order to preserve the *status quo* and the subject matter of this appeal from dissipation.

2. On September 2, 1947, an order of the District Court for the Southern District of California was made

and entered ordering interim partial allowance on account of expenses and attorneys' fees in the total sum of $67,-295.13 to be paid from funds in the registry of said District Court in connection with a proceeding entitled *Paul Mallonee, et al., v. John H. Fahey, et al., defendant,* No. 5421-PH; said payments to be made as follows:

To Shareholder Members Protective Committee for costs and expenses	$15,530.29
To Westover & Smith, attorneys for plaintiffs, for costs and expenses	1,534.77
To Westover & Smith, attorneys for plaintiffs, on account of attorneys' fees	50,000.00

3. Thereafter and on September 10, 1947, appellant's application for a review of said order of September 2, 1947, by the three-judge court heretofore convened in said action in the District Court was denied.

4. A notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit has been duly and regularly filed pursuant to rule in the said District Court for the Southern District of California from the said order of September 2, 1947, allowing partial interim attorneys' fees and expenses and from the order denying a review thereof.

5. The Honorable Peirson M. Hall, Judge of said District Court for the Southern District of California, has unconditionally denied appellant's application for a stay of execution upon that part of the order allowing costs and expenses, and has conditionally denied appellant's application for a stay of execution upon that part of the order providing for payment of attorneys' fees to Westover & Smith, conditioned upon the filing of a bond with the Court providing for the repayment of the $50,000.00 in

the event this Court, upon appeal, reverses the District Court herein.

6. Said appeal is taken by the direction of the Department of Justice of the United States of America acting through the Solicitor General. Pursuant to Rule 62 (e) of the Federal Rules of Civil Procedure, no bond, obligation or other security is required from appellant for an order staying execution.

7. The instant application for the stay of execution is directly connected with and is in aid of this Court's appellate jurisdiction in the appeal herein; that unless execution of said order is stayed during the pendency of this appeal said funds will be paid from the money in the registry of the said District Court; that a stay of execution is therefore necessary and appropriate to preserve the *status quo* and prevent loss and dissipation of the subject matter of this appeal.

8. This motion for a stay, pending appeal, is made upon the ground that appellant is entitled thereto pursuant to Rules 62 and 73 of the Federal Rules of Civil Procedure as of right, and that the interests of justice will be best served by the preservation of the *res* of said appeal in *status quo* pending the determination of this Court.

WHEREFORE, appellant prays that an order of this Honorable Court issue directed to the District Court for the Southern District of California staying execution in said Court of the order entered September 2, 1947, in the action entitled "Paul Mallonee, *et al.* v. John H. Fahey, *et al.*, being number 5421-PH, ordering interim partial allowance on account of expenses and attorneys' fees, pending the final decision of this Court upon the appeal taken therefrom.

I.

A Brief History of the Course of Litigation in Which Said Order of the District Court of September 2, 1947, Was Entered Is as Follows:

a. The Long Beach Federal Savings and Loan Association was organized under Section 5 of the Home Owners' Loan Act of 1933, and is supervised by the Federal Home Loan Bank Administration. Pursuant to Section 5 (d) of that Act, specifically authorizing appointment of a conservator and regulations issued thereunder, A. V. Ammann was appointed, on May 20, 1946, conservator of the Association by the Federal Home Loan Bank Administration on the grounds that it had been determined that the Association was conducting its business in an unlawful, unauthorized and unsafe manner; that it had a management which was unsafe and unfit to manage a Federal savings and loan association; and that it was pursuing a course that was jeopardizing and injurious to the interests of its members, its creditors and the public. Said appointment was made by Federal Home Loan Bank Administration Order No. 5254, a copy of which is set out for convenience of the Court in the appendix hereto at page 27. Said conservator took peaceable possession of said Association on that day, and since that time, with the exception of the first two days in October, 1946, he has been charged with the exclusive management of the Association. On May 27, 1946, appellees Mallonee *et al.* (shareholders in the Association) brought this action in the District Court for the Southern District of California. They prayed for the return of the Association to the old management, as well as for other relief. Seeking to enjoin enforcement of Section 5 (d) on the ground that it was unconstitutional, appellees requested a three-judge court;

motions for preliminary partial relief were filed by appellees and motions to dismiss for failure to state a cause of action and for lack of jurisdiction of appellants (petitioners herein), and a hearing on these motions was held by the three-judge court on July 15, 1946. Meanwhile, the Association had in May, 1946, demanded, pursuant to Section 206.2 of the Regulations (footnote to *Fahey v. Mallonee,* appendix p. 40), a more definite statement of the causes for the conservator's appointment and such a statement was promptly furnished by the Bank Administration, a copy appearing, appendix, page 28. On May 30, 1946, the Association, through its president and secretary, demanded the administrative hearing provided by Section 206.2, which was promptly granted by Bank Administration Order No. 5309 and set for July 3, 1946, in the City of Los Angeles. The shareholder plaintiffs promptly added to their pending motion to enjoin a merger of the Association, motions for a preliminary injunction and for a temporary restraining order to restrain the holding of the administrative hearing. Although the Association through its president and secretary had demanded the administrative hearing, it orally joined in this motion and a temporary restraining order was immediately issued and subsequently made permanent. On September 5, 1946, the three-judge court issued an opinion holding Section 5 (d) unconstitutional as unlawfully delegating legislative authority, and on September 30, 1946, that court entered what amounted to a final decree, granting all relief prayed for by appellees' complaints, including the complete restoration of the old management, and a permanent injunction against appellants' "ever asserting any claim, right, title or interest" in or to the property of the Association.

b. The three-judge court denied any stay of enforcement pending appeal, and the old management was re-

turned to possession and control of the Association on the evening of September 30, 1946. On October 1, 1946, Mr. Justice Rutledge of the Supreme Court stayed execution of the decree (excepting the injunction against merger of the Association with any other institution), and ordered that if the old management had already taken possession of the Association, the conservator should be placed back in possession forthwith. On October 2, 1946, the conservator resumed possession and control and he has since been acting as such conservator.

c. An appeal from the decree of the three-judge court was immediately taken by appellants.

d. On November 9, 1946, appellees moved the Supreme Court to vacate the stay and to restore the Association to its old management pending the appeal. After a hearing before Mr. Justice Rutledge and a reference by him of the application to the entire Court, the motion was denied by the entire Court on December 9, 1946.

e. The cause was set for argument during the session commencing April 28, 1947, and after argument thereon, June 23, 1947, the opinion of the Supreme Court was handed down reversing the judgment of the three-judge court; said opinion being cited as *Fahey, et al., v. Mallonee, et al.,* 330 U. S. ....., 67 S. Ct. 1552, 91 L. Ed. 1574, and printed herein for the convenience of the court, appendix, page 34.

f. During the pendency of the appeal to the Supreme Court, and prior to the decision therein, appellees in that cause secured from the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California (one of the judges composing the three-judge court), an order directing a hearing on the motions of appellees Mallonee *et al.* (shareholders), of

appellee Long Beach Federal Savings and Loan Association (acting through its former management), and of appellee Title Service Company, for interim orders approving and allowing costs and expenses to them, and approving and allowing attorneys' fees to their attorneys. These sums were to be payable out of the sum deposited in the registry of the District Court, in the course of this litigation, as explained in paragraph g. below.

g. During the course of the litigation in the District Court, an intervenor (Home Investment Company) deposited in the court's registry, pursuant to court order, the sum of approximately $800,000, which sum represented amounts due to the Long Beach Federal Savings and Loan Association on account of loans made by it upon certain trust deeds, and said sums constituted payment in full of said loans. This money admittedly belongs to the Association. The deposits by said intervenor were made necessary by the refusal of the appellee Title Service Company (a corporation managed and directed by practically the same officers and directors who were in charge of Long Beach Federal Savings and Loan Association before the appointment of the conservator), which is the trustee under said trust deeds, to execute releases, and reconveyances thereof without such deposit, on the ground that the conservator was illegally in control of the Association. Accordingly, without objection, said sum was paid into the District Court's registry instead of directly to the Association and appropriate releases and reconveyances thereafter made. Subsequent petitions in intervention similar to that of the Home Investment Company have increased the amount deposited in the court registry to approximately $1,200,-000.00; $50,000.00 of the sum in the court's registry represents a draft in that amount, payable to one Robert

H. Wallis, who filed a cross-claim in interpleader in connection with said draft. This check apparently represents one-half of the sum of $100,000.00 appropriated by the Board of Directors of the Association, prior to the establishment of the conservatorship, for the purpose of litigation against the Federal Home Loan Bank Administration; the improper diversion of said sum was one of the reasons for the appointment of the conservator.

h. The movants also requested an allowance of attorneys' fees, likewise payable out of the above described fund, to attorneys for Mallonee *et al.* (shareholder plaintiffs), for the Long Beach Federal Savings and Loan Association, and for the Title Service Company. Allowances were requested for services in this litigation up to approximately March 6, 1947, and the right to request allowances for subsequent services was expressly reserved. The request was for allowances in reasonable amounts to be set by the District Court. Affidavits by two members of the California bar were filed which respectively valued the attorneys' services at $125,000 and $115,000.

i. A hearing was held on these motions before District Judge Peirson M. Hall on April 7, 1947, at which appellant Ammann strongly resisted the granting of such motions in whole or in part, and urged that the District Court was without power to grant said motions, both because of the stay issued by Mr. Justice Rutledge and continued in force by the Court, and because the case was then pending on appeal in the United States Supreme Court, and upon other grounds hereinafter set forth. Petitioner Fahey (the other appellant in the Supreme Court) did not appear at said hearing, since it was his contention that the lower court had no jurisdiction of his person.

j. After hearing, Judge Hall granted the motion with respect to costs and expenses, and also with respect to counsel fees for Messrs. Westover and Smith, counsel for the shareholder plaintiffs. On April 7, 1947, District Judge Hall orally directed Messrs. Westover and Smith to prepare a judgment, in accordance with his opinion delivered in open court, ordering the Clerk of the District Court to pay to the appropriate parties, out of the fund in the court's registry, the sum of $17,295.13 to cover costs and expenses, and the sum of $50,000.00 as an allowance for counsel fees to Messrs. Westover and Smith. Prior to the signing of a formal order thereon;

k. A petition for a writ of mandamus and/or prohibition and/or injunction was immediately filed in the Supreme Court seeking the appropriate writ against the Honorable Peirson M. Hall, Judge of the District Court of the United States for the Southern District of California, and on such petition a rule to show cause was issued directed to Judge Hall and he was thereby restrained from taking any further action in the matter of fees, and the said rule to show cause was set for argument immediately following the argument in the appeal from the decree of the three-judge court.

l. The application for the writ was denied by the Court on the ground that appeal to the appropriate court was the proper remedy and that the status of the conservator, having been fixed by the decision in the main case that the conservator could take any proper appeals at the proper time. *Ex parte John H. Fahey, et al.,* 330 U. S. ....., 67 S. Ct. 1558, and printed herein for the convenience of the court, in the appendix hereto, page 47.

m. On September 2, 1947, as above stated, the mandate in the above named case having been spread on

August 19, 1947, findings of fact, conclusions of law and decree were entered in the fee matter; copies of such findings, conclusions and decree are set forth in the appendix hereto at page 49.

n. An application for a review by the three-judge court pursuant to Title 28, Section 792, U. S. C. A., of the order allowing interim attorneys' fees, costs and expenses was timely made, and on September 10, 1947, such application was denied. A copy of the order denying such review appears in the appendix at page 61.

o. Immediately upon the filing of the order denying review by the three-judge court a notice of appeal from the order allowing interim attorneys' fees, costs and expenses and from the order denying a review thereof by the three-judge court was filed. Thereafter and on September 11, 1947, an amended notice of appeal was filed, a copy of which appears in the appendix hereto at page 65.

p. Immediately upon the filing of an original notice of appeal, on September 10, 1947, an application was made in open court for an order staying execution of the order allowing interim attorneys' fees, costs and expenses pending appeal. An affidavit was filed in opposition to such application, which affidavit appears in the appendix hereto at page 66.

Q. On September 10, 1947, the application of appellant for a stay of execution pending appeal was denied by the District Court. Thereafter and on September 30, 1947, the formal order denying such stay of execution reciting certain conditions attached thereto was duly filed with the Clerk of the Court. A copy of such order denying stay of execution appears in the appendix hereto at page 79.

Summary of Material Included in Appendix.

For the convenience of the Court we have included in the appendix hereto the following material above referred to which may be useful for reference:

1. Order No. 5254 of the Federal Home Loan Bank Administration appointing A. V. Ammann conservator of the Long Beach Federal Savings and Loan Association.

2. More definite statement of the causes for the appointment on May 20, 1946, of the conservator for Long Beach Federal Savings and Loan Association, Long Beach, California.

3. Opinion of the Supreme Court of the United States rendered June 23, 1947, in the case of *Mallonee v. Fahey.*

4. Opinion of the Supreme Court of the United States rendered June 23, 1947, denying appellant's application for a writ of mandamus and/or injunction and/or prohibition in the matter of fees and expenses.

5. Findings, conclusions of law and order allowing interim attorneys' fees, costs and expenses.

6. Order denying a review by the three-judge court.

7. Amended notice of appeal.

8. Affidavit of Paul Mallonee in opposition to stay of execution.

9. Order denying stay.

II.

In the Opinion of the Attorneys for the Appellant the Appeal in This Matter Is Meritorious in That It Involves Serious Questions of Fact and Law.

It is the contention of appellant that:

1. The District Court erred in entering its order allowing attorneys' fees and costs in that said order was premature since such fees and costs are not allowable in a derivative shareholders' suit unless and until plaintiffs have been finally successful in their action.

2. The District Court erred in entering its order allowing attorneys' fees and costs out of the funds in the registry of the District Court since the efforts of plaintiffs neither recovered the fund for the benefit of the Association nor preserved it from dissipation.

3. The District Court erred in finding that the defendants John H. Fahey and A. V. Ammann intended to merge and consolidate the Association with other financial institutions and in finding that the filing and prosecution of the suit herein protected and preserved the Association and prevented merger and consolidation thereof with other institutions.

4. The District Court erred in entering its findings of fact, conclusions of law and judgment since such findings, conclusions and judgment are contrary to and in conflict with the decision and opinion of the Supreme Court of the United States in the case of *Fahey, et al. v. Mallonee, et al.,* 330 U. S. ....., 67 S. Ct. 1552, in that the findings of fact wherein the Court found that the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Association with other finan-

cial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and membership and that the filing and prosecution of this lawsuit by the plaintiffs herein protected and preserved said Association and its assets, are without competent evidence to sustain them and are in direct conflict with said decision and opinion of the Supreme Court, particularly that part of said opinion and decision reading as follows:

> "We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or *of evidence to sustain one,* we accept the Government's assurance that merger will not follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers." (Italics supplied.)

5. The District Court erred in finding the Shareholders' Protective Committee was the plaintiff.

6. The District Court erred in finding that a controversy exists between the conservator and the Title Service Company which makes it impossible for the Title Service Company to determine whether reconveyances should be made.

7. The District Court erred in finding that persons having loans to the Association could obtain marketable title to their property only through the medium of this suit.

8. The District Court erred in finding that the legal services of Westover & Smith, representing the plaintiffs,

the Shareholder Members' Protective Committee, in their endeavor to protect and preserve the Association and its assets were of the value of $50,000.00 or of any value whatever, in that said legal services did nothing to protect and preserve the Association nor to recover any of its assets and in the light of the subsequent decision of the Supreme Court such efforts were purely abortive and harmful rather than helpful to the Association.

9. The District Court erred in entering judgment prior to completion of the litigation.

10. The District Court abused its discretion in entering its order on September 2, 1947, upon the application for fees and argument thereunder, which was held on April 7, 1947, since in the interim the Supreme Court of the United States had reversed the judgment of the District Court and many of the conditions assumed as existing before the District Court on April 7, 1947, were completely changed by that reversal, yet no consideration was given to these changed conditions by the District Court before entering its judgment on September 2, 1947, said judgment being entered solely upon the application and record made and opinion rendered on April 7, 1947.

11. The District Court erred in making a final order allowing interim fees, costs and expenses since such order may not properly be made by a single judge in a case before a three-judge court under the provisions of Title 28, U. S. C. A., Section 792.

12. The District Court erred in denying review of its order by the three-judge court.

13. The District Court was without jurisdiction to enter judgment for attorneys' fees and expenses.

POINTS AND AUTHORITIES.

III.

The Filing of the Notice of Appeal Operated to Grant an Automatic Stay.

Rule 62(d), Federal Rules of Civil Procedure, provides:

> "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. . . . The stay is effective when the supersedeas bond is approved by the court."

Rule 62(e) provides as follows:

> "When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant."

Under the provisions of subsection (d) filing the notice of appeal and securing approval of the bond in and of themselves operate as a stay when a private litigant is appellant. No further action by the court is necessary. That is true under the rules and it was true under the prior statute. Moore's Federal Practice, Volume 3, page 3299, Section 62.04; Federal Redbook and Practice Annual, page 1.171.

Rule 73(a) of the Federal Rules of Civil Procedure supplants the petition for appeal, order allowing appeal and citation on appeal, which was the procedure following the enactment of Section 861(a), Title 28, U. S. C. A., abolishing writs of error. It substitutes the notice of appeal for the former procedure. The rights of the appellant are in no way changed.

Rule 62(d) and (e), Federal Rules of Civil Procedure, were patterned on and taken from Title 28, U. S. C. A., Sections 869 and 870. Sections 869 and 870 are, respectively, a restatement and codification of Revised Statute, Sections 1000 and 1001.

This statement is made because most of the cases construing the rights of appellants to a stay of execution pending appeal were decided under the statutes rather than under the rule. The statutes so restated by Rule 62(d) and (e) were construed in the following cases:

In *Hovey v. McDonald,* 109 U. S. 150, the court said:

> "One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause. This includes a suspension of the power to execute the judgment or decree. But, of course, besides merely taking an appeal, those additional things must be done which the law requires to be done in order to give to the appeal a suspensive effect, whether it be security for the payment of the claim or to the condition imposed by law."

In *Goddard v. Ordway,* 94 U. S. 672, the court said:

> "A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf."

For an appeal to operate as a supersedeas all that must be done is to comply with the requirements of the rules. What are the requirements of the rules as to an appeal being taken by direction of a department of the Government? How is such an appeal taken? Rule 73(a) tells us: "By filing with the District Court a notice of ap-

peal." As to private suitors taking an appeal not by direction of a department of the Government another rule requirement exists: that of giving a supersedeas bond; but under Rule 62(e) there is no requirement for a supersedeas bond. Consequently, filing a notice of appeal is the only requirement made by the rule as to this appeal. Appellant has by filing notice of appeal complied with every requirement of the rules that is applicable to him. As the court said in the *Hovey* case, having appealed and having complied with every requirement which the law sets out, the appeal *ipso facto* operates to suspend the power of the lower court to execute the judgment or decree.

McCourt v. Singers-Bigger, 150 F. 102 (C. C. A. 8th), in construing the above statute, states the rule to be as follows:

> "A supersedeas, like an appeal, *is a matter of right, and its allowance does not rest in the discretion of the court or judge.* 'It follows, as a matter of law, from a compliance by the appellant with the provisions of the act of Congress in that behalf.' Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; 1 U. S. Comp. St. 1901, pp. 712, 714, 716, Secs. 1000, 1007, 1012. Section 1007, which provides that the defeated party may obtain a supersedeas, and may give the security required by law, *confers upon him the right so to do,* and leaves *no lawful power in the judge to refuse or disregard the supersedeas when the case is appealable,* the required security is given, and the other provisions of the statute in this regard are complied with. Section 1000, which directs that the justice or judge signing a citation shall take good and sufficient security that the plaintiff in error or

appellant 'shall answer all damages and cost where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas, as aforesaid,' imposes upon the justice or judge the duty to take adequate security, but it leaves to the defeated litigant the option to give such security for damages and costs, and in that way to obtain a supersedeas, or to give security for costs only, and thus to permit the judgment or decree to be executed immediately. The cases in which the writ or the appeal, as the case may be, is a supersedeas and stays execution, are determined by the provisions of the acts of Congress, and not by the opinion or discretion of the judge or justice. His only function is to determine whether or not the security offered is good and sufficient. If it is, it is his duty to take it, and upon his acceptance of it the execution of the judgment or decree is stayed. Where adequate security for damages and costs is presented in the time and manner prescribed by the statutes, the duty of the court to accept it is plain and imperative, and the law itself works the supersedeas. Simpson v. First National Bank, 129 Fed. 257, 260, 63 C. C. A. 371; Lockman v. Lang, 132 Fed. 1, 4, 65 C. C. A. 621; Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; Draper v. Davis, 102 U. S. 370, 371, 26 L. Ed. 121."

Volume III of Moore's Federal Practice at page 3301 thereof states the rule as follows:

"Subdivision (e) is derived substantially from 28 U. S. C. Section 870. 'When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States,' and a stay is authorized un-

> der other subdivisions of Rule 62, the United States, etc. is entitled to a stay without the necessity of giving bond, obligation or security. Thus where a money judgment was entered against a collector of customs, and an appeal was taken by direction of a department of the government, the appeal operates as a supersedeas.' "

There is only one thing in the rules which by even the remotest chance could make that conclusion other than crystal clear. That is the phase in Rule 62(e) "and the operation or enforcement of the judgment is stayed." But all that clause does is to take out of the class of cases in which the appeal operates as a stay those cases which are excepted in subdivisions (a) and (d) of Rule 62, that is, injunctions, etc., because that kind of judgments is not stayed at all except by special order.

The decision of the Supreme Court of the United States in *Schell v. Cochran,* 107 U. S. 625, supports the above conclusions. Sections 1000 and 1001 of the revised statutes to which the court refers in its opinion are Sections 869 and 870 of Title 28. In effect, they say what Rule 62(e) says, so that the *Schell* decision can be applied directly to the situation here. In that decision the court said at page 628:

> "A writ of error in a case of this kind being brought by direction of a department of the Government operates as a supersedeas, under sections 1000 and 1001 of the revised statutes, without any bond to answer in damages being given."

IV.

Even if the Granting of a Stay Is Discretionary With the Court, the Court Has Abused Its Discretion in Failing to Grant the Stay Unconditionally.

In the instant case the Court has ordered the paying out of approximately $67,000.00 from funds in the registry of the court which funds unquestionably belong to the Association. The Conservator, whose duty it is to preserve these funds for the benefit of its members, protests such payment on behalf of the members. Courts should not be hasty to pay out large sums of money for counsel fees where the litigation involves, after all, only the right to management of the property and assets of the institution. There is a serious dispute here as to the right of the Court to pay out these funds. That dispute should be settled by this Appellate Court. Whether or not the Conservator is right in his contentions, the fund should be preserved intact and the *status quo* maintained until this Court has had the opportunity to exercise its appellate jurisdiction.

Conclusion.

The Court has ordered payment of approximately $67,000 on account of fees, costs, and expenses. The correctness of such order is in dispute. An appeal has been taken to this Court. Such appeal was promptly, in fact *immediately* taken. Appellant has a clear right to have this Court pass on the merit of such an appeal.

The fund which is the *res* of this appeal should remain undisturbed pending this Court's decision. For the lower court to permit a change in the status of this *res* pending appeal, is to trespass upon the function of the Appel-

late Court and to disturb its effective appellate jurisdiction by permitting the *res* to be dissipated.

Consider the terms of the order denying a stay.

As to the $17,065.06 allowed for costs and expenses, *immediate* and unconditional payment to the "Shareholder Members Protective Committee" is allowed. If this Court should reverse the District Court, it is highly problematical whether the sum could be recovered. It is doubtful indeed if such committee is a sueable entity, and the liability of its members is speculative if not remote. The licensing of such a committee by the Corporation Commissioner of the State of California gives it no status except to permit the solicitation of funds and acceptance of contributions from other shareholder members.

A serious question is presented that the payment of this sum would moot the appeal. At best a decision favorable to appellant would only present him with a right to pursue further and vexatious litigation with ultimate collection improbable.

As to the $50,000 attorneys' fees, the Court, by requiring a bond from the appellee to repay, has recognized the fact that this Court may reverse. But the posting of a bond, even if a precedent or statutory authorization for such bond be found, does not preserve *status*.

Here, too, a successful appellant instead of finding his position restored intact, is presented with a right to bring new litigation to restore the status, this time a right carrying security for collection.

The order by its very terms is an open invitation to multiplicity of suits and vexatious and troublesome liti-

gation. Surely sound logic cannot contemplate that a successful appellant is to be placed in this position.

We contend that the cases hereinabove cited, if they go no farther, conclusively establish the right of a private litigant in a case such as this to obtain a supersedeas by the filing of a bond. Under the terms of Rule 62(e) a bond is not required of the government. The reason for this rule, we believe, is a recognition of the financial responsibility of the government, and perhaps also an acknowledgment of the *bona fides* of an appeal taken at the direction of, and with the authorization and approval of the Solicitor General.

But the lower court has in its interpretation penalized the government because the Federal Rules grant it a privilege not extended to private litigants. Reduced to syllogistic terms the fallacy in the reasoning of the lower court becomes at once apparent:

Major Premise: A private litigant may obtain a supersedeas as of right by the posting of a bond.

Minor Premise: The government is relieved of the requirement of posting bond.

Conclusion: The government may not obtain a supersedeas as of right.

The voluminous, hybrid order denying the stay of execution, reciting several pages of attempted justification for the Court's denial, attaching as exhibits two prior orders already a part of the record, and conditioned upon the unprecedented requirement that the appellee file a bond is, to say the least, rather unusual. The solicitude of the Court in attempting to preserve for the govern-

ment a *secured* right to seek recovery of *75%* of the lost funds is recognized. Nevertheless the Court has violated the right of appellant to an unconditional stay of execution pending the outcome of the appeal.

Is it not more in line with orderly procedure to maintain the *res* of the appeal intact and to preserve the *status quo* pending a speedy determination of the appeal?

Respectfully submitted,

James M. Carter,
United States Attorney,

Ronald Walker,
Assistant United States Attorney,
Attorneys for Appellant.

Ray E. Dougherty,
Associate General Counsel
Home Loan Bank Board,
Of Counsel.

APPENDIX.

FEDERAL HOME LOAN BANK ADMINISTRATION

Order No. 5254
Date May 20, 1946

Whereas, it has been determined that the Long Beach Federal Savings and Loan Association, Long Beach, California:

Is conducting its business in an unlawful manner;

Is conducting its business in an unauthorized manner;

Is conducting its business in an unsafe manner;

Has a management which is unsafe to manage a Federal savings and loan association;

Has a management which is unfit to manage a Federal savings and loan association;

Is pursuing a course that is jeopardizing the interests of its members;

Is pursuing a course that is jeopardizing the interests of its creditors;

Is pursuing a course that is jeopardizing the interests of the public;

Is pursuing a course that is injurious to the interests of its members;

Is pursuing a course that is injurious to the interests of its creditors; and

Is pursuing a course that is injurious to the interests of the public; and

Whereas, it has been determined to be in the interest of said association, its members, creditors, and the public to appoint a conservator to take possession of said asso-

ciation and to conserve its assets pending further disposition of said association and its affairs:

Now, Therefore, A. V. Ammann is hereby appointed conservator for the Long Beach Federal Savings and Loan Association, Long Beach, California, to take possession of said association and to conserve its assets pending further disposition of said association and its affairs; and, as such conservator, to have and exercise all of the powers and rights, enjoy all of the privileges, and assume and perform all of the duties and responsibilities of his office accorded or imposed by law, the Rules and Regulations for the Federal Savings and Loan System, and orders issued by the Federal Home Loan Bank Administration, or otherwise.

I hereby certify that the above is an order issued by the Federal Home Loan Bank Administration on May 20, 1946.

J. Francis Moore,
Secretary.

More Definite Statement of the Causes for the Appointment on May 20, 1946, of the Conservator for Long Beach Federal Savings and Loan Association, Long Beach, California.

T. A. Gregory
350 East Fourth Street
Long Beach 2, California

The following is a more definite statement of the causes for the appointment on May 20, 1946, of a Conservator of the Long Beach Federal Savings and Loan Association:

1. Said Association, in the opinion of the Federal Home Loan Bank Administration, was conducting its business in an unlawful, unauthorized, and unsafe manner, and was pursuing a course that was jeopardizing and injurious to the interests of its members, creditors, and the public in that:

(a) During the period from September 11, 1945, to March 7, 1946, disbursements of funds of said Association totaling $14,500 were made to its President, T. A. Gregory, without proper voucher therefor, or explanation thereof in the records of the Association, itemized as follows:

September 11, 1945	T. A. Gregory	$1000.00
October 22, 1945	Wired to T. A. Gregory, Wash., D. C.	1000.00
November 5, 1945	Wired to T. A. Gregory, Wash., D. C.	1000.00
November 24, 1945	T. A. Gregory	1000.00
December 1, 1945	Wired to T. A. Gregory, Wash., D. C.	2000.00
January 19, 1946	T. A. Gregory	2000.00
January 31, 1946	Cash (Wired to T. A. Gregory)	1500.00
February 20, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
February 28, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	2000.00
March 7, 1946	Cash (Wired to T. A. Gregory at Wash., D. C.)	1000.00
	Total	$14,500.00

(b) Disbursements totaling $14,500, itemized under (a), were used for purposes beyond the scope of the Association's business.

(c) Funds of the said Association totaling $2455.60 were dibursed to Howard S. Leroy, an attorney at law at Washington, District of Columbia, on or about January 30, 1946, January 31, 1946, and March 6, 1946, although said attorney had not been retained by the said Association, nor were such funds paid to said attorney for the handling of any business of the said Association, or otherwise for the benefit of said Association.

(d) The Board of Directors of said Association attempted in the following manner to relieve T. A. Gregory from accountability to the said Association for its funds used by him for purposes beyond the scope of the said Association's business:

(1) The said Board of Directors, according to the minutes of a special meeting, dated January 16, 1946, voted to compensate T. A. Gregory retroactively in the sum of $11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment.

(2) The said Board of Directors, according to the minutes of the special meeting, dated January 16, 1946, voted to increase T. A. Gregory's salary from $8250 to $20,000 per year.

(3) On April 6, 1946, reimbursement of said Association's funds paid to T. A. Gregory and used

by him for purposes beyond the scope of the Association's business, was recorded on the books of said Association by means of an offset against the purported liability of the Association to T. A. Gregory for the said sum of $11,750 and for the voted increase for the first three months of 1946.

(e) The Association, by vote of its Board of Directors, purportedly on January 16, 1946, undertook to compensate T. A. Gregory retroactively in the sum of $11,750 for services rendered by him in 1945, for which the said T. A. Gregory had already been paid in accordance with the terms of his employment, said purported retroactive salary increase being unlawful and unauthorized.

(f) The Association paid salaries and fees which were excessive and not commensurate with the services rendered.

(g) The Board of Directors of said Association on May 8, 1946, appropriated the sum of $100,000 of the funds of said Association for the purpose of restraining the proper use of safeguards and controls provided by the Congress of the United States with respect to Federal Savings and Loan Associations, and threatened the removal of said sum from the proper control of said Association.

(h) During the course of a regular examination commencing on May 18, 1946, by Examiners of the Federal Home Loan Bank Administration, a director and officer of the said Association unlawfully and improperly removed a cashier's check in the amount of $50,000, payable to the said Association and representing funds belonging to it, without accounting therefor.

(i) On or about May 8, 1946, the said Association, through its officers, executed a purported lease on a hotel property located at 332 American Avenue, Long Beach, California, owned by it to one George Turner for a 20-year period on terms which, in effect, would give to the said Turner the use of said property without adequate consideration therefor to the said Association.

(j) Said Association was being used for the personal gain of one or more officers and directors thereof, to the detriment of its members and creditors.

(k) Said Association, through its officers, engaged in activities which were inimical to the interests of veterans of the Armed Forces, including veterans of the Armed Forces who were members of the said Association.

(l) Certain directors of the said Association, namely: T. A. Gregory, J. E. Gregory, M. T. Killingsworth and S. I. Bacon, on or about May 18, 1946, undertook to convert, or attempted to convert, their shareholdings and other funds totaling approximately $21,000 into approximately 21,000 separate purported share accounts of $1.00 each, in violation of the rights of over 16,000 share account holders of said Association, and in violation, or attempted violation of their duties as directors.

(m) Said Association failed to file copies of audit of said Association made by F. W. Lafrentz & Co., Certified Public Accountants, Los Angeles, California, as of the close of business May 19, 1945, or thereabouts, as required by Section 203.2 of the Rules and Regulations for the Federal Savings and Loan System.

(n) The said Association failed to maintain its books of accounts and records correctly.

(o) The records or statements of the Association were falsified in that either

(1) The minutes of the Board of Directors' meeting of January 16, 1946, were falsified by the entry therein of actions by said Board purporting to have been taken increasing T. A. Gregory's salary from $8250 to $20,000 per year, and purporting to authorize the payment of $11,750 to T. A. Gregory as extra compensation for the year 1945,

or

(2) The said Association's liabilities were misrepresented by the Board of Directors to the Federal Home Loan Bank Administration in monthly reports for the months ending January 31, 1946, February 28, 1946 and March 30, 1946.

2. Said Association, in the opinion of the Federal Home Loan Bank Administration, had a management which was unfit and unsafe to manage a Federal Savings and Loan Association in that, among other things,

(a) The matters set forth in sub-items (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o) of Item 1, above are herein incorporated by reference.

(b) T. A. Gregory in 1934 (but only recently known to the Federal Home Loan Bank Administration) acquired control of the Reliable Building-Loan Association, Long Beach, California, and so manipulated its affairs that he was enabled to acquire, through the medium of Somerset Finance Co., a substantial number of certificates of the Reliable Building-Loan Association at a small fraction of their true value, and subsequently redeemed said cer-

tificates at the Reliable Building-Loan Association at their true value, while like treatment was denied to others, all to the detriment of the members of the said reliable Building-Loan Association, and to his own personal gain.

(c) The officers of said Association failed to keep or cause to be kept the books of account and records of the Association correctly.

J. Aldrich Hall,
Attorney for Federal Home Loan Bank Administration.

Dated: May 29, 1946.

Supreme Court of the United States.

No. 687.—October Term, 1946.

John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association, Appellants, v. Paul Mallonee, et al.

[June 23, 1947.]

Appeal from the District Court of the United States for the Southern District of California.

Mr. Justice Jackson delivered the opinion of the Court.

A specially constituted three-judge District Court has summarily, without trial, entered final judgment ousting a Conservator who, on orders of the Federal Home Loan Bank Commissioner, had taken possession of the Long Beach Federal Savings and Loan Association. It granted this and other relief on the principal ground that §5(d) of the Home Owners Loan Act of 1933, as amended, violates Article I, §§1 and 8 of the Constitution.

The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession. The grounds assigned were that the Association was conducting its affairs in an unlawful, unauthorized and unsafe manner, that its management was unfit and unsafe, that it was pursuing a course injurious to, and jeopardizing the interests of, its members, creditors and the public. Plaintiffs at once commenced this class action in the right of the Association against the Conservator and Fahey, Chairman of the Federal Home Loan Bank Board, the Association as a nominal defendant, and several others not important to the issue here. The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other relief. Other parties in interest intervened. Temporary restraining orders issued and a three-judge court was duly convened.

Personal service was secured upon Ammann, the Conservator, but Fahey, the Federal Home Loan Bank Commissioner, officially an inhabitant of the District of Columbia, could not be served in California. A motion for substituted service, therefore, was granted and process was served upon him in the District of Columbia. It was believed that this was authorized by Judicial Code, §57, 28 U. S. C. §118. Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action. Fahey appeared specially to move dismissal

or quashing return of service on him upon the ground that he could not, in his official capacity, be sued in California and had not been served properly with process. Neither had answered the complaint, nor had their time to do so expired, when final judgment was granted against them.

The three-judge court set a variety of pending motions for argument and, after argument mainly on the constitutionality of §5(d), with only pleadings and motion papers before it, held the section unconstitutional, ordered removal of the Conservator, permanently enjoined the authorities from holding an administrative hearing on the matter, permanently enjoined an apprehended merger, restored the institution to its former management, ordered the Conservator to account and enjoined these authorities "from ever asserting any claims, right, title or interest" in or to the Association's property. The case is here on direct appeal. 50 Stat. 752-53, 28 U. S. C. §§349a, 380a.

It is manifest that whatever merit there may be in various subsidiary and collateral questions, this drastic decree can stand only if the section, as applied here, is unconstitutional.

Its defect is said to consist of delegation of legislative functions to the supervising authority without adequate standards of action or guides to policy. Section 5(d) of the Act gives to the Board "full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such as-

sociations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation." 48 Stat. 133, 12 U. S. C. §1464(d). This, the District Court held was unconstitutional delegation of the congressional function. It relied on Panama Refining Co. v. Ryan, 293 U. S. 388, and Schechter v. United States, 295 U. S. 495.

Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. Chief Justice Hughes emphasized these features, saying that the Act under examination was not merely to deal with practices "which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general dec-

laration of policy in section one." Schechter v. United States, 295 U. S. 495, 535.

The savings and loan associations with which §5(d) deals, on the other hand, are created, insured and aided by the federal government. It may be that explicit standards in the Home Owners Loan Act would have been a desirable assurance of responsible administration. But the provisions of the statute under attack are not penal provisions as in the case of Lanzetta v. New Jersey, 306 U. S. 451, or United States v. Cohen Grocery Co., 255 U. S. 81. The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in unchartered fields.

The Board adopted rules and regulations governing appointment of conservators. They provided the grounds upon which a conservator might be named,[1] and they

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[1]The Rules and Regulations for the Federal Savings and Loan System provide in part as follows:

PART 206. APPOINTMENT OF CONSERVATOR OR RECEIVER.

§206.1. *Receiver or conservator; appointment.* (a) Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) Is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) Is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) Cannot with safety continue in business;

(4) Is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) Is in imminent danger of becoming impaired;

(6) Is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) Has suspended payment of its obligations;

(8) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) Has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) Has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration,

the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Gover-

(Footnote 1 continued on p. 40.)

are the usual and conventional grounds found in most state and federal banking statutes.[2] They are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review if there should be a proper occasion for it.

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nor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor.

§206.2. *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall deter-

(Footnote 1 continued on p. 41.)

It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this

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mine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration.

§206.4. *Discharge of conservator or receiver.* An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. 24 C. F. R. Cum. Supp. §206.1 *et seq.*, as amended, 24 C. F. R. 1943 Supp. §206.1.

[2]Bank Conservation Act of March 9, 1933, §203, 48 Stat. 2-3, 12 U. S. C. §203; Banking Act of 1933, §31, 48 Stat. 194, 12 U. S. C. §71a; National Housing Act, §406, 48 Stat. 1259-60, 12 U. S. C. §1729. *E. g.*, New York Banking Law, §606, 4 McKinney's Consolidated Laws of New York 708-709, (pocket part) 125-26; Page's Ohio General Code Ann., §687; 1 Deering's California General Laws, Act 986, §13.11; Massachusetts Laws Ann. c. 167, §22; c. 170B, §4; Jones Illinois Stat. Ann., §14.40.

summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional.[3]

In this case an administrative hearing was demanded and specifications were asked as to the charges against the management of the Association. The hearing was granted and a statement of complaints against the management was furnished.

The causes for the appointment of a conservator as therein set forth by the Board included withdrawals by the president without proper voucher therefor; payment of salaries and fees not commensurate with services rendered; a director's unlawful removal of a cashier's check in the amount of $50,000 during an examination by Federal Home Loan Bank examiners; leasing properties of the Association for a twenty-year period on terms which would not provide adequate consideration to the Association; use of the Association for personal gain of one or more officers and directors; failure to maintain proper accounts and to make proper reports; and falsification of records. It also charged certain manipulations of the affairs of another institution by the president of this institution.

The plaintiffs nevertheless demanded and obtained an injunction to prevent the administrative hearing and they have therefore cut off the making of a record as to whether these charges are well-founded. Nor did the trial court take evidence on the subject. We must assume that the supervising authorities would be able to sustain the

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[3]See note 2.

statements of fact and to justify the conclusions in their charges for the purpose of determining the case without trial. We are therefore unable to agree with the court below that the section is invalid and hence that regardless of the charges the management was free to go on undisciplined and unchecked.

But even if the section were defective, which we think it is not in a constitutional sense, another obstacle stands in the way of ousting this conservator.

The Long Beach Federal Savings and Loan Association was organized in 1934 under §5 of the Home Owners Loan Act of 1933, subsection (d) of which is now sought to be declared unconstitutional. The present management obtained a charter which provided that the Association "shall at all times be subject to the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to valid rules and regulations made thereunder as the same may be amended from time to time," and that it might be "liquidated, merged, consolidated, or reorganized, as is provided in the rules and regulations for Federal savings and loan associations." In 1937, upon the Association's request, an amended charter was issued which likewise provided that the Association was to exercise its powers subject to the Home Owner's Loan Act and regulations issued thereunder.

This is a stockholder's derivative action in which plaintiffs sue only in the right of the Association. It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." United States v. San Francisco, 310 U. S. 16, 29. As formu-

lated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses which its management may perpetrate. It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.

There are other important and difficult questions raised in the case which it becomes unnecessary to decide.

Objection is made to the administrative hearing upon the ground that it is before the same authority which has preferred the charges and that it cannot be expected therefore, to be fair and impartial and that the Act does not provide for judicial review of the Board's determination on the hearing. We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted. We do not now decide whether the determination of the Board in such proceeding is subject to any manner of judicial review. The absence from the statute of a provision for court review has sometimes been held not to foreclose review. Stark v. Wickard, 321 U. S. 288; Federal Reserve Board v. Agnew, 329 U. S. 441; Administrative Procedure Act, 5 U. S. C. §1009. Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government's assurance that merger will not

follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers.

Since the judgment that has been rendered against the Conservator, who was duly served with process, must be reversed, we find it unnecessary to decide whether Fahey was indispensable party or was properly brought into the case by substituted service.

It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.

Our decision is that it was error in the court below to hold the section unconstitutional, to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law. The judgment is

Reversed.

Mr. Justice Douglas concurs in the result.

Mr. Justice Rutledge concurs in the result and in the Court's opinion insofar as it rests upon the ground that the controlling statute, §5(d) of the Home Owners' Loan Act of 1933, is not unconstitutional.

Supreme Court of the United States.

No. 133, Misc.—October Term, 1946.

Ex Parte John H. Fahey and A. V. Ammann, Individually and Respectively as Federal Home Loan Bank Commissioner and Conservator for the Long Beach Federal Savings and Loan Association.

[June 23, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

This petition by John H. Fahey, individually and as Federal Home Loan Bank Commissioner, and A. V. Ammann, individually and as Conservator for the Long Beach Federal Savings and Loan Association, invokes the original jurisdiction of this Court. They ask leave to file petition for a writ of "mandamus and/or prohibition and/or injunction" against Judge Peirson M. Hall of the United States District Court for the Southern District of Califorcia to vacate his order allowing fees to counsel in Fahey v. Mallonee, decided today, to prohibit any further allowance therein, and to enjoin any payments heretofore allowed.

While an appeal in the principal case was pending in this Court, application was made by various counsel for the plaintiffs and associated interests therein for allowance of fees aggregating some $125,000. The District Court allowed counsel for plaintiffs $50,000 as a partial payment on account of services, but withheld action on other applications. Certain costs and expenses of the plaintiffs in the amount of $17,295.13 were also ordered reimbursed.

The petition involves serious questions of law and of fact. Whether, because of the pendency of the appeal and the stay order granted therein, the District Court had

power to entertain the application, whether before the final outcome of the case could be known an allowance was premature, whether the source of the fund on deposit with the court was so related to the services as to be subject to disbursement for their compensation, and whether one judge can make allowances in a case before a three-judge court, are, with other questions, much contested. We do not decide any question as to the merits.

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

We find nothing in this case to warrant their use. An allowance of $50,000 will hardly destroy a twenty-six million dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs.

The petition is

Denied.

[Title of Court and Cause.]

Findings of Fact, Conclusions of Law and Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees Incurred by the Plaintiffs, the Shareholders Protective Committee, Prior to March, 1947.

Submitted pursuant to direction in the opinion of the court announced April 7, 1947.

The motion of the plaintiffs, the Shareholder Members Committee, suing as representatives of the shareholder members of the Long Beach Federal Savings and Loan Association, for an interim allowance on account to reimburse the plaintiffs for their expenses and attorneys' fees incurred by them in their efforts for the protection and preservation of the funds and assets of the said association, from being merged, consolidated or commingled or otherwise lost or dissipated prior to March 1, 1947, having been previously filed with supporting exhibits and points and authorities by the plaintiffs on March 6, 1947, and this court having on said day made its order setting the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. in Court Room No. 3, located in the Federal Building at Los Angeles, California, as the time and place for the hearing of said motion, and the court on March 6, 1947, made its order that notice of the filing of said motion and of the time and place of the hearing thereof should be given by the plaintiffs, the Shareholders Members Protective Committee, to all parties who have appeared in the action by service of a copy of said order upon their respective solicitors or attorneys and that the Shareholders Members Protective Committee give public notice of the filing of said motion and of the time and place of the hearing thereof by publication of the said order of this

court, on or before the 12th day of March, 1947, in the following newspapers of general circulation in the County of Los Angeles, State of California, to wit:—

(1) The Long Beach Independent,

(2) The Long Beach Press Telegram, and

(3) The Los Angeles Daily Journal;

And the notices of the time and place of the hearing of said motion and the publication of the said order fixing the time and place of the said hearing, having been duly given pursuant to said order and by publication as aforesaid of said order, thus giving notice to the shareholder members of the said Long Beach Federal Savings and Loan Association and affidavit of publication of said order having been filed and the plaintiffs having served and filed the affidavits of John W. Preston, former Justice of the California Supreme Court, and L. R. Martineau, Jr., Esquire, setting forth their respective expert opinions of the reasonable value of the services rendered by counsel for the plaintiffs and the matter having duly and regularly come on for hearing on the 24th day of March, 1947, at the hour of 10:00 o'clock A. M. and no person having appeared or filed any objection thereto, save and except the defendant A. V. Ammann, and the hearing of said motion having been duly and regularly continued upon the court's own motion to the 7th day of April, 1947, and the defendant A. V. Ammann having served and filed documents entitled "Resistance to Motions" and "Supplemental Points and Authorities in Support of Resistance to Motions," and the plaintiffs, the movants herein, having duly served and filed their Closing Statement and Points and Authorities within the time allowed by the court, and the resistor, the defendant Ammann, having filed no counter

affidavits denying or contravening the said affidavits or other factual documents filed by the plaintiffs, the matter came on regularly for hearing at 10:00 o'clock A. M., on the 7th day of April, 1947, and none of the shareholder members of the said Long Beach Federal Savings and Loan Association having made any objection thereto, and no other persons having made any objection to the granting of the said motion for an interim allowance on account of attorneys' fees and expenses, save and excepting only the resistor-defendants A. V. Ammann and John H. Fahey;

And there appearing Wyckoff Westover, Esquire, of the firm of Westover and Smith, attorneys for the plaintiffs; Ronald L. Walker, Esquire, Assistant United States Attorney, and Ray E. Dougherty, Esquire, Associate General Counsel of the Federal Home Loan Bank Administration, representing the resistor-defendants, A. V. Ammann and John H. Fahey; Charles K. Chapman, Esquire, appearing for the defendant and cross-complainant Long Beach Federal Savings and Loan Association; H. O. Wallace, Esquire, of the firm of Thomas and Wallace, appearing for the defendant and cross-claimant in interpleader, Title Service Company, a corporation, and Raymond Tremaine, Esquire, appearing as attorney for the defendant and cross-claimant in interpleader, Robert H. Wallis;

And the Court having offered the opportunity to any and all persons and parties in the court room to present further or additional testimony or objection and there being none offered and the resistor-defendants, A. V. Ammann and John H. Fahey, having presented no contravailing affidavits or oral or documentary evidence and the matter having been argued at length; the matter was submitted for decision.

The Court, being fully advised in the premises, now finds:

Findings of Fact.

(1) that proper notice of the hearing of said motion has been duly and regularly given, both by service on counsel and by publication, and

(2) that the Court has jurisdiction of the persons and subject matter involved, and

(3) that no objections have been made by any of the shareholder members whose money and funds are here involved, and

(4) that no objection has been made by any other person or persons, excepting only, the resistor-defendants A. V. Ammann and John H. Fahey, and

(5) that the shareholder members represented by the plaintiffs the Shareholder Members Protective Committee are the actual owners of the funds and assets of the Long Beach Federal Savings and Loan Association, which is a mutual association, and that they are legally and equitably entitled to use a small portion of their own funds for the protection and preservation of the corpus of the main fund which consists of the assets and funds of the Long Beach Federal Savings and Loan Association, and to prevent the merger, consolidation, or commingling of the Long Beach Federal Savings and Loan Association, and/or its assets, with any other association or institution and to preserve the said funds and assets of said association and to prevent further runs and to protect against their further dissipation by the resistor-defendants A. V. Ammann and John H. Fahey, and to aid and assist in obtaining the ultimate return of the Long Beach Federal

Savings and Loan Association and its assets, to the management of their, the shareholder members, own choice, and

(6) The plaintiffs herein, the Shareholder Members Protective Committee, are duly and regularly licensed and authorized to transact and carry on business as such in the State of California, by virtue of license No. L. A. A37621, file No. 80282 L. A., issued pursuant to Chapter 784, Statutes of 1937 of the State of California, and duly renewed on the 2nd day of January, 1947, by the Department of Investments, Division of Corporations, of the State of California, and

(7) That the defendants John H. Fahey and A. V. Ammann intended to merge or consolidate the Long Beach Federal Savings and Loan Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to commingle and disperse its assets and memberships by commingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and

(8) That the filing and prosecution of the suit herein did protect and preserve the association and its assets and funds, in that it prevented the defendants or some of them from dissipating and breaking up the Long Beach Federal Savings and Loan Association, its membership shares and organization, by merging, consolidating, reorganizing or uniting said association, or commingling said association's assets, membership shares, or members with other organizations, banks, corporations, associations, or institutions, which would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach Federal Savings and Loan Association, as found by the undersigned from the

factual showing made before him on May 27, 1946, in a restraining order issued on said date, and

(9) That the terms of said restraining order issued on the 27th day of May, 1946, continued in full force and effect, and became a portion of the decree of the three-judge statutory court, made on September 30, 1946, which portion of said decree was not stayed in the stay order issued by the Honorable Justice Wiley Rutledge, Associate Justice of the United States Supreme Court, on October 1, 1946, and

(10) That in the six days from the date of seizure on May 20, 1946, of the said association's property by the appellant Ammann and the filing of the within suit on May 26, 1946, the run of withdrawals of money by shareholder members was approaching a panic and resulted in the withdrawals of approximately six million dollars ($6,000,000.00) or at the rate of approximately one million dollars ($1,000,000.00) a business day; that the filing of the within action on the 27th day of May, 1946, preserved the assets of said association by changing the trend of withdrawals so that in the period of approximately the next seven weeks withdrawals amounted to only two million dollars ($2,000,000.00) or at the rate of only approximately forty-eight thousand dollars ($48,000.00) per business day; that had said trend of withdrawals not been changed, said association would have been nearly or completely destroyed by the withdrawal of shareholder members, and

(11) That by long established custom and usage in real estate transactions in Southern California, and particularly in the County of Los Angeles, State of California, titles are not acceptable to purchasers, nor can real property be encumbered in regular channels, except upon the

issuance of a policy of title insurance by a dependable, established title insurance company licensed under the laws of the State of California, and

(12) That loans upon real property in the State of California are not ordinarily secured by mortgages, but instead, trust deeds are used almost exclusively, by which the fee title to the property encumbered is deeded to a third party, usually a corporation, which acts as trustee with the power of foreclosure, and which trustee, upon the payment of the indebtedness, must execute a deed of reconveyance upon the request of the payee in the note, which payee is referred to as the beneficiary in the deed of trust, and

(13) That said association had loans on approximately eight thousand (8,000) parcels of land in the face amount of approximately twelve million dollars ($12,000,000.00) of unpaid balances, and

(14) That the Trustee holding fee title to all of said parcels of property was and is Title Service Company, defendant, and cross-claimant in interpleader herein, and

(15) That at all times after the seizure by said Ammann of the property and records of said Association on May 20, 1946, the officials of said association refused to recognize the validity of said seizure and as a result thereof a controversy developed between said Ammann and said Association, which controversy made it impossible for said Title Service Company to determine whether or not after payment by the debtor, a reconveyance of the fee title should be made by said Title Service Company, as such trustee, upon demand of said Ammann, or on demand of said Association; that as a result of said controversy, the undersigned District Judge has allowed petitions in intervention by borrowers on notes secured by trust deeds, in

order to enable them to secure merchantable titles to the property, and to thus avoid demands upon them for double payment of said notes and to avoid the costs and delay of foreclosures, and

(16) That by the maintenance of the within suit, the plaintiffs herein and their counsel have provided a means and inducement for all of the persons having loans from said association to pay said loans and secure valid reconveyances, and also to secure policies of title insurance, which were otherwise not obtainable and without which they would have had no merchantable title to their property, and

(17) That the value of the services of the firm of attorneys Westover & Smith and their associates, in representing the plaintiffs the Shareholder Members Protective Committee up to March 1, 1947, in their endeavor to protect and preserve the said Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately sixteen thousand (16,000) shareholder members, is substantially in excess of the sum of fifty thousand dollars ($50,000.00), and

(18) That an interim allowance on account of such attorneys' fees and a partial satisfaction thereof can be made at this time without endangering the solvency of the said association; that there is on deposit now in the registry of this court funds belonging to the Long Beach Federal Savings and Loan Association in excess of eight hundred thousand dollars ($800,000.00), from which an interim partial allowance on account of such attorneys' fees for services rendered prior to March 1, 1947, can be safely made; that a reasonable amount to be allowed at

this time on account of and in partial satisfaction of such attorneys' fees is the sum of Fifty Thousand Dollars ($50,000.00), which is less than one-fifth of one percent of the assets of said association, to-wit: Twenty-six Million Dollars ($26,000,000.00); and

(19) That the plaintiffs, the Shareholder Members Protective Committee, have incurred extraordinary expenses in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets, and properties, which prior to March 1, 1947, amounted to fifteen thousand five hundred thirty and 29/100 ($15,530.29) dollars, and that said plaintiffs, the firm of Westover & Smith and their associate Daniel W. O'Donoghue, Jr., have expended the sum of one thousand five hundred thirty-four and 77/100 ($1,534.77) dollars and two hundred thirty and 07/100 ($230.07) dollars, respectively, for the protection and preservation of the Long Beach Federal Savings and Loan Association, and its assets and properties, and that they are entitled to reimbursement therefor; and

(20) That there was no objection by said petitioners or any other party to the jurisdiction of respondent District Court at any time SINCE THE ISSUANCE OF THE STAY ORDER, issued by the Honorable Justice Wiley Rutledge on October 1, 1946, until motions were made by the resistor-defendants Fahey and Ammann to the United States Supreme Court for Writ of Mandamus and/or Prohibition and/or Injunction, which said Writ was denied by the United States Supreme Court, although there have from

time to time been allowed numerous interventions and deposits in Court, after motions and notices duly served upon all necessary parties. Said interventions have been allowed on behalf of borrowers who desired to pay off their indebtedness to enable them to secure clear title to their property.

Conclusions of Law.

From the foregoing findings of fact the Court now makes and renders its conclusions of law.

That from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with the Clerk of this Court the plaintiffs and their counsel are entitled to be paid the following amounts of money to the following persons, to-wit:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,530.29) Dollars.

2. To the firm of Westover & Smith, attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four and 77/100 ($1534.77) Dollars in-

curred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars ($50,000.00)—on account.

Judgment.

It Is Hereby Ordered, Adjudged and Decreed that the plaintiffs and their counsel have Judgment for the following amounts of money payable to the following persons from the funds and assets of the Long Beach Federal Savings and Loan Association, and the Clerk of this Court is Hereby Ordered to pay from the moneys and funds of the Long Beach Federal Savings and Loan Association now on deposit with him in this action the said following amounts of money to the following persons:

1. To the plaintiffs the Shareholder Members Protective Committee for the extraordinary expenses which they have incurred in connection with the protection and preservation of the Long Beach Federal Savings and Loan

Association and its assets and properties during the period prior to March 1, 1947, the sum of Fifteen Thousand Five Hundred Thirty & 29/100 ($15,530.29) Dollars.

2. To the firm of Westover & Smith, attorneys for the plaintiffs, to reimburse them for the costs and expenses incurred by them for the period prior to March 1, 1947, in connection with the protection and preservation of the Long Beach Federal Savings and Loan Association and its assets and properties, the sum of One Thousand Five Hundred Thirty-four & 77/100 ($1534.77) Dollars incurred during the same period of time and for the same purposes by their Associate Counsel in Washington, D. C., Daniel W. O'Donoghue, Jr., Esquire;

3. To Westover & Smith, attorneys for the plaintiffs, as an interim partial allowance on account of attorneys' fees for the professional services rendered by them and their associate, Daniel W. O'Donoghue, Jr., Esquire, of Washington, D. C., in representing the Shareholder Members Protective Committee in its endeavor to protect and preserve the Long Beach Federal Savings and Loan Association and its assets and the interests of its approximately Sixteen Thousand (16,000) shareholders and members during the period of time prior to March 1, 1947—the sum of Fifty Thousand Dollars ($50,000.00)—on account.

Dated at Los Angeles this 2nd day of September, 1947.

/s/ Peirson M. Hall,
PEIRSON M. HALL,
Judge.

[Title of Court and Cause.]

Order Denying Application for Review by Three Judge Court Pursuant to Title 28, Section 792, U. S. C. A.

On this 10th day of September, 1947, at the hour of 10:00 o'clock a. m., before the undersigned United States District Judge, and pursuant to notice theretofore given in accordance with the terms of an order of court, the application of the defendant A. V. Ammann, as conservator of the Long Beach Federal Savings and Loan Association for review by the three judge court, heretofore convened in the above-entitled action and "Findings of Fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the shareholders protective committee, prior to March, 1947," made and entered in the above-entitled matter on the 2nd day of September, 1947, and for a stay of execution thereon in connection with and pending such review, both having come on for hearing on the above date and hour; and Westover & Smith appearing as attorneys for said plaintiffs, H. O. Wallace appearing as attorney for cross-claimant in interpleader, Title Service Company, Charles K. Chapman appearing as attorney for Long Beach Federal Savings and Loan Association, defendant, third party plaintiff and cross-claimant, Raymond Tremaine for cross-claimant in interpleader and defendant Robert H. Wallis, and James M. Carter, United States Attorney, and Ronald R. Walker, Assistant United States Attorney, appearing as attorneys

for said defendant A. V. Ammann, as well as Ray E. Dougherty, associate general counsel Home Loan Board, appearing specially; and

It appearing to the Court that the three judge statutory court, which was convened and sat in this matter on July 15 and 16, 1946, under Title 28, Section 380(a), was limited to the determination as whether or not an interlocutory or permanent injunction suspending or restraining the enforcement, operation or execution of, or setting aside in whole or in part an act of Congress, to wit, portions of the Home Owners Loan Act of 1933 as amended, upon the ground that such act or any part thereof was repugnant to the Constitution of the United States; and

It further appearing that said Court rendered the decision granting the injunction prayed for in the said matter on the ground that Section 5(d) of said Act was repugnant to the Constitution of the United States, and made and entered its judgment accordingly on the 30th day of September, 1946; and

It further appearing that thereafter an appeal was taken from said judgment of the said three judge court directly to the Supreme Court of the United States which, on June 23, 1947, rendered its opinion holding said Section 5(d) not to be repugnant to the Constitution of the United States and ordering the judgment of said three judge court reversed; and

It further appearing pursuant to said opinion that the mandate in compliance therewith was spread in the above-entitled court on the 19th day of August, 1947; and

It further appearing that the power of said three judge court was limited to a consideration of the question of constitutionality and that upon the reversal of the judgment of said three judge court by the Supreme Court and spreading of the mandate on the 19th day of August, 1947, as aforesaid terminated any and all power and jurisdiction of said three judge court; and

It further appearing that the final hearing by the said three judge or statutory court was had on July 15 and 16, 1947; and

It further appearing that the hearing upon which the said findings of fact, etc., hereinabove referred to were made, was held by the undersigned on April 7, 1947; and

It further appearing that subsequent thereto and, to wit, on April 12, 1947, the undersigned received telegraphic notice that the Supreme Court, on a petition theretofore filed by and on behalf of John H. Fahey and A. C. Ammann, prohibited, enjoined and restrained the undersigned from taking any further proceedings in connection with the petitions for allowance of attorneys' fees and expenses theretofore filed on behalf of various parties, including the said Westover & Smith and the said plaintiffs, which telegraphic notice was subsequently followed by formal notification from the clerk of the Supreme Court to the undersigned judge; and

It further appearing that pursuant to said order of prohibition, injunction and restraint, the undersigned judge took no action in connection with the matters covered by

said order of prohibition, injunction and restraint until after the decision of the Supreme Court on the 23rd day of June, 1947, denying said petition of said John H. Fahey and A. V. Ammann for a permanent order of prohibition, enjoinder and restraint and until after the spreading and filing of the mandate from the Supreme Court hereinabove referred to on August 19, 1947.

From the foregoing, it is hereby concluded by the undersigned that on the 2nd day of September, 1947, on the date of signing, making and entering the said findings of fact, etc., the said three judge court was not in existence and is not now, and that the final hearing as contemplated by Section 792 of Title 28 was had on July 15 and 16, 1946.

Now, therefore, it is hereby ordered that said application for review to the three judge court be, and it is hereby denied; and it is further hereby ordered that inasmuch as the application for stay of execution was requested only in the event the application for review to said three judge court was granted, that said stay of execution falls with the denial of the application for review to the three judge court.

Dated: At Los Angeles, California, this 10th day of September, 1947.

/s/ Peirson M. Hall,
Peirson M. Hall,
Judge of the District Court United States.

[Title of Court and Cause.]

Amended Notice of Appeal From Order for Interim Partial Allowance on Account of Expenses and Attorneys' Fees Incurred by the Plaintiff, Shareholder Members Protective Committee, Prior to March, 1947.

Notice is hereby given that the defendant A. V. Ammann as Conservator of the Long Beach Federal Savings and Loan Association, by the direction of the Department of Justice of the United States of America acting through the Solicitor General, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain Order made and entered on September 2, 1947, allowing attorneys' fees and expenses in the total amount of $67,065.06 to be paid as follows: To the plaintiff, the Shareholder Members Protective Committee, $15,530.29 for costs and expenses; to Westover & Smith for costs and expenses, $1,534.77; to Westover & Smith as interim partial allowance on account of attorneys' fees, $50,000, and from the further order of the court made and entered on September 10, 1947, denying the application for a review of said order of September 2, 1947, pursuant to Title 28, Section 792, U. S. C. A., by the three judge court heretofore convened in the above entitled action.

Dated this 11th day of September, 1947.

James M. Carter,
United States Attorney.

Ronald Walker,
Assistant U. S. Attorney.

[Title of Court and Cause.]

Affidavit of Paul Mallonee in Opposition to Application for Stay of Execution Re: Order for Fees and Expenses.

State of California, County of Los Angeles—ss.

Paul Mallonee, being first duly sworn, deposes and says:

I.

Your affiant is chairmen of the Shareholders Protective Committee suing as representatives of the class of 16 thousand shareholder depositors whose deposits totaled 22½ million dollars in the Long Beach Federal Savings and Loan Association, the seizure of which association by certain defendants is the cause of this litigation. That said shareholders committee of which affiant is chairman holds the proxies of the majority of the said 16 thousand shareholders in said seized Long Beach Federal Savings and Loan Association and is acting on behalf of and by the authority of the said majority of said shareholders. The committee is authorized by the California Corporation Commissioner so to act, under permit No. L. A. A37621.

II.

That in March, 1946 the defendants without notice, cause or hearing seized, merged and dissolved the 46 million dollar Federal Home Loan Bank of Los Angeles. That defendant Long Beach Federal Savings and Loan Association was a stockholder in the seized Los Angeles Bank and had millions of dollars of its government bonds in the custody of said seized bank. That the Long Beach Association resisted the confiscation of the Los Angeles

Bank and because of such resistance, on May 20, 1946, also without notice, hearing or trial, the Long Beach Federal Savings and Loan Association, which then had 16 thousand shareholder depositors, 8 thousand borrower members, and 26 million dollars in assets was also seized by the same defendants. That at the time of their seizures the institutions were completely solvent, both had surpluses of over one million three hundred thousand dollars each and the Long Beach Association had grown in 12 years from $7,500 to $26,000,000.00. That in the last month before it was seized the Long Beach Association had gained in new deposits approximately $600,000. That it was so completely solvent that when seized, said defendants met from the assets of the seized association a run of approximately 10 million dollars which developed in the first few weeks after its seizure.

That a Congressional Investigation of the seizure was made and the Congressional Committee recommended that both the Los Angeles Bank and the Long Beach Association be restored to their rightful management and that the defendants remove themselves from the possession they had thus seized.

That this action was brought in the United States District Court for the Southern District of California and resulted in a finding by the three Honorable Judges that the law under which said defendants had seized the Long Beach Association was unconstitutional. This judgment was appealed by said seizing defendants to the United States Supreme Court. While the appeal to the United States Supreme Court was pending, plaintiffs made this application to the trial court for a temporary, partial allowance on account of attorneys fees and expenses in-

curred in bringing and maintaining this action in the Federal Courts for the preservation and restoration of their $26,000,000 in property. Only the defendants Fahey and Ammann resisted the allowance of fees and expenses to those whose property they had seized. None of those who owned the property objected. The trial Court after due notice, full hearing, and submission of many affidavits and numerous points and authorities made the allowance which defendants Fahey and Ammann are now seeking to delay by this stay.

Defendants Fahey and Ammann made an application to the Supreme Court of the United States for a special writ of prohibition, mandamus and/or injunction seeking to prevent the trial judge, Honorable Peirson M. Hall, from signing the order allowing fees and expenses. Pending the action in the Supreme Court, Judge Hall, out of respect for the Supreme Court, would not sign the order and took no further steps in the fee application matter. The Supreme Court of the United States refused the writ applied for and said in part: "An allowance of $50,000.00 will hardly destroy a $26,000,000.00 association during the time it would take to prosecute an appeal . . . The petition is denied."

The trial court found that the amount allowed was less than 1/5 of one per cent of the assets of the association.

III.

For 15 months plaintiffs have been fighting for the restoration to the rightful owners of the seized assets of this association. This fight has thus far gone through a Congressional Investigation, a hearing before three Federal Judges at Los Angeles, a Supreme Court appeal

taken by the defendants Fahey and Ammann which resulted in the action being returned for trial on the facts and now after all of this delay, defendants Fahey and Ammann are yet seeking to prevent payment to plaintiffs of the funds necessary to prosecute the litigation. Their motive in such resistance is plain. If they cannot win by the justice of their cause they hope at least to win by the exhaustion of plaintiffs and their counsel. Litigation of this magnitude, involving these amounts, is exhausting in the time and effort consumed and defendants Fahey and Ammann hope that by withholding, impeding and delaying the very life blood of litigation, the money necessary to finance the proper presentation of plaintiffs' cause, they will thereby win, not by the merit or justice or right of their own case but by plaintiffs being unable to any further prosecute the litigation because of exhaustion of plaintiffs' funds.

IV.

Pursuant to the order of the trial judge fixing the time and place of hearing and the notice to be given of such hearing on the application for fees and expenses, notice was published in papers published in the Cities of Long Beach and Los Angeles where most of the depositors of said association reside. NOT ONE DEPOSITOR HAS OBJECTED TO THE PAYMENT OF THE FEES AND EXPENSES. The only objection has come from the defendants Fahey and Ammann against whom the fee will be used to cause them to submit the merits and justice of their seizure to an impartial federal trial court. The money allowed in the fee application does not belong to Fahey nor Ammann.

V.

This litigation has already continued for 15 months, has gone to the United States Supreme Court and back again and by order of the United States Supreme Court will probably be launched into a lengthy factual trial which will consume many months in the trial court and which will undoubtedly be appealed by the defendants Fahey and Ammann if decided against them.

Fahey and Ammann will not be deprived of one cent by this allowance. They have seized money which they admit belongs to others. Those whose money it is not only make no objections but urge and ask the Court to let them use part of their own money. Fahey and Ammann resist on behalf of whom? Certainly not those to whom the money belongs. These Shareholder owners for whose protection Fahey and Ammann claim to be acting, disavow what Fahey and Ammann have done. They not only want this temporary allowance, they want their whole property back! Fahey and Ammann, while withholding the whole property, seek also by these delays to prevent the use of even a tiny part of the seized property to present to the courts the justice or injustice of their seizure. The assembling of evidence, the taking of depositions scattered across the United States involves thousands of dollars and months of time. The resistence by Fahey and Ammann to plaintiffs use of their own money comes with very poor grace from those who are using plaintiffs money in payment of their own salaries, in payment of their deputies, examiners, and the legal staff of the Federal Home Loan Bank Board.

VI.

The very appeal about to be taken by defendants Fahey and Ammann on this fee order will require tremendous amounts of time and money on the part of plaintiffs to protect even this fee and expense allowance. A printing of the record will be necessary, briefs must be prepared and much labor expended. Already because of defendants Fahey and Ammann's appeal to the Supreme Court of the United States plaintiffs have been compelled to pay the expense of printing the record, printing of briefs and costs in the amounts of many thousands of dollars. In addition, it has been necessary to finance numerous trips to Washington, D. C., some 3,000 miles from the offices of the Association, all occurring since the allowance and not covered thereby.

Wherefore, affiant prays that the money allowed plaintiffs by the trial court (which allowance defendants unsuccessfully attacked in the United States Supreme Court) be paid forthwith that it may be utilized immediately for the purposes for which it was allowed—the protection of the rights of the 16,000 shareholder depositors, and the 8000 borrowers, whose $26,000,000 in assets, was seized by these defendants, without notice, hearing, or trial; and that the motion for stay of execution be denied. Further affiant sayeth naught.

/s/ Paul Mallonee.

Subscribed and sworn to before me this 9th day of September, 1947.

Margaret O. Shallis,

Notary Public in and for the County of Los Angeles, State of California.

Points and Authorities in Support of Opposition to the Granting of a Stay of Execution of the Order for Interim Partial Allowance of Fees and Expenses.

Point I.

It rests within the discretion of this Honorable Court as to whether or not a stay of execution of the order for partial interim allowance of fees and expenses should be granted. This Court is in a position to judge best whether or not the balance of convenience requires the immediate payment of the money allowed.

In Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission, 67 L. Ed. 217, 260 U. S. 212 (1922), the Supreme Court of the United States, in considering an application for stay of execution said:

"But the Court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and therefore is familiar with the record. Records in cases are often very voluminous. Such is the record in this case. Without abdicating our unquestioned power to grant such an application as this, and conceding that exceptional cases may arise, we are generally inclined to refer applications of this kind to the court of three judges who have heard the whole matter, have read the record, and can pass on the same issue without additional labor. That was the course taken by this court in Southern R. Co. v. Watts, 66 L. ed. 1071; 259 U. S. 576, U. S. Supreme Court (1922). A similar order will be made here. . . ."

The very purpose of an interim allowance is to make available money to present the case to the courts for de-

cision. The quality and nature of the appeal for justice will be limited by the availability of finances for its presentation. The stay of the order for money will weaken the cry for relief of the distressed whose property has been seized.

The granting or denying of a stay in this matter will affect the strength of the case presented against defendants Fahey and Ammann. This is why they have delayed payment by seeking writs in the Supreme Court and now seek further delay in this court to prevent the use against themselves of the money they seized which belongs to the plaintiffs.

This discretion as to a stay is primarily reposed in the trial court as was set forth in the case of:

> Fidelity Deposit Co. of Maryland v. Davies, Circuit Court of Appeals, 4th Circuit (1942), 127 F. (2d) 780,

wherein the court said: "Whether he (District Judge) shall grant the stay or not is a matter resting in his sound discretion under all the circumstances of the case. Magnum Import Co. v. Coty, 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922; Blue Gem Dresses v. Fashion Originators Guild, 2 Cir., 116 F. 2d 142; Orth v. Steger, D. C., 258 F. 625; Williams v. Keyes, 135 Fla. 719, 186 So. 250." (Interpolation ours.)

Therefore the stay of execution is one for the Trial Court to determine for itself in the first instance. Such determination should not be merely for the purpose of permitting the appellate court to exercise a duty resting primarily upon the Trial Court.

Further as is shown in the case of

Magnum Import Company v. De Spoturno, etc., 67 L. Ed. 922; 262 U. S. 160 (1923),

the application must be made in the first instance to the trial or lower court and when determined by them (unless discretion is abused) will not be reversed by the appellate court. In this case, the Supreme Court said:

"When, therefore, after the petition is filed and before its submission, an application is made for a suspension of the judgment or decree of the circuit court of appeals, a heavy burden rests on the applicant. The petition should in the first instance, be made to the circuit court of appeals, which, with its complete knowledge of the cases, may, with full consideration, promptly pass on it. That court is in a position to judge, first, whether the case is one likely, under our practice, to be taken up by us on certiorari; and, second, whether the balance of convenience requires a suspension of its decree and a withholding of its mandate. It involves no disrespect to this court for the circuit court of appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us . . . This is a matter, however, wholly within its discretion. If it refuses, this court requires an extraordinary showing before it will grant a stay of the decree below, pending the application for a certiorari, and even after it has granted a certorari, it requires a clear case and decided balance of convenience before it will grant such stay.

. . . Coming now, to the circumstances presented on the inquiry before us, we find nothing to justify our granting the motion. It is clear that the circuit court of appeals gave full consideration to a similar motion, and, with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a matter." (Emphasis added.)

The law is thereby settled that the granting or denying of the stay of execution rests primarily with the Trial Court and that the application for such must be made to them first and not initially in the appellate court.

Further, the trial court's determination of the matter will, (unless extreme circumstances be shown) be conclusive on appeal to the appellate court.

Point II.

The discretion of the trial court can be exercised as a court of equity by making allowance for attorney fees and other expenses pending the litigation payable out of the common fund.

Trustees v. Greenough, 105 U. S. 527 at 538.

The severability of the allowance of expenses and attorney fees from a decision on the merits of the issues at any stage in the proceedings was recognized by the Supreme Court of the United States in the case of

Sprague v. Ticonic National Bank, 307 U. S. 161 at page 168 (1938).

Expenses and fees may be allowed from a common fund in the discretion of the trial court even where the litigation is unsuccessful. In the case of

> Eggert v. Pacific States Savings and Loan Co., 53 Cal. App. (2d) 552, 127 Pac. 999,

in allowing attorney fees to O'Melveny and Myers in the sum of $36,270.00, although they were unsuccessful in obtaining for the Pacific States Savings and Loan Company, whom they represented, any participation in the common fund, the Court followed the principle that a beneficiary may litigate, defend and protect a common fund and may be awarded counsel fees out of the trust assets if the defense is conducted in good faith and on reasonable grounds. (Citing Trustees v. Greenough, supra, and other cases, including Anderson v. Great Republic Life Insurance Co., 41 Cal. App. (2d) 181.) "A different rule does not apply, even though the beneficiary is unsuccessful in the litigation. Dingwall v. Seymour, 91 Cal. App. 483 at 513 (267 Pac. 327)."

The California Supreme Court followed a similar rule in the case of

> Winslow v. Harold G. Ferfuson Company, 25 Cal. (2d) 274 (1944),

wherein they approved the interim allowance of expenses and counsel fees to litigants who were endeavoring to preserve and protect the common fund even before termination of the litigation.

POINT III.

The allowance of fees and expenses does not involve a distribution, or determination of the right of possession of the corpus of the common fund, which is the subject of this litigation.

In an effort to prevent the payment of the fees and expenses, Fahey and Ammann, in their petition to the Supreme Court for a writ of mandamus, and/or prohibition, and/or injunction, urged that the Association would be harmed by such payment. The Supreme Court held otherwise and stated:

"An allowance of $50,000.00 will hardly destroy a $26,000,000.00 association during the time it would take to prosecute an appeal."

Ex parte Fahey, No. 133 Misc. Oct. Term, 1946, Supreme Court of the United States.

The amount so awarded represents approximately 1/5th of 1% of the total assets of the seized institution.

The denial of the requested Stay of Execution and immediate payment of the amounts allowed is urgently required to prevent manifest injustice.

Respectfully submitted,

WESTOVER & SMITH,
By /s/ WYCKOFF WESTOVER,
WYCKOFF WESTOVER,
Attorneys for Plaintiffs.

CONCURRENCE AND JOINDER

The undersigned concur and join in the foregoing.

CHARLES K. CHAPMAN,
/s/ CHARLES K. CHAPMAN,
CHARLES K. CHAPMAN,

Attorney for Long Beach Federal Savings and Loan Association.

THOMAS & WALLACE,
By /s/ H. O. WALLACE,
H. O. WALLACE,

Attorneys for Title Service Company.

Received copy of the within document this 10th day of September, 1947. James M. Carter, U. S. Attorney; by Ronald Walker, Ass't U. S. Attorney, Attorney for Defendants John H. Fahey and A. V. Anmann. O'Melveny and Myers, by Pierce Works; Richard Fitzpatrick, Attorneys for Defendants Federal Home Loan Bank of Los Angeles. Hoffman and Bishop, Attorneys for Defendants Federal Home Loan Bank of San Francisco. Raymond Tremaine, Attorney for Defendant Robert H. Wallis.

[Title of Court and Cause.]

Order Denying Application for Stay of Execution of Order Allowing Attorneys' Fees and Expenses.

On the 10th day of September, 1947, before the undersigned United States District Judge, an oral application having been made in open Court by James M. Carter, United States Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board, for an Order staying execution of the Order of this Court, dated September 2, 1947, allowing interim partial fees and expenses incurred prior to March 1, 1947, to the plaintiffs, the Shareholder Members Protective Committee, and to Westover and Smith, their attorneys, said application having been made in the presence of Wyckoff Westover of Westover and Smith, attorneys for the plaintiffs; Charles K. Chapman, attorney for the defendant, cross-claimant and third party plaintiff, Long Beach Federal Savings and Loan Association; Raymond Tremaine, attorney for defendant and cross-claimant Robert H. Wallis; H. O. Wallace of Thomas and Wallace, attorneys for defendant and cross-claimant Title Service Company; John Whyte of O'Melveny and Myers, attorneys for defendant and cross-claimant Federal Home Loan Bank of Los Angeles; and

Said application for such stay of execution having been made without prior notice of motion, without supporting points and authorities, without supporting affidavits or other factual showing of any nature whatsoever; and

There having been filed on behalf of the plaintiffs and appellees the Shareholder Members Protective Committee,

an affidavit and points and authorities opposing the granting of a stay of execution of said Order, allowing interim partial fees and expenses; and

The matter having been argued by counsel for such parties as desired to be heard, and the court having considered the affidavit, points and authorities, presented by the plaintiffs and appellees, having considered the records and files in the entire proceedings, and the Court being fully advised in the premises and it appearing to the Court:

(1) That "The Federal Home Loan Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession." (Fahey v. Mallonee, United States Supreme Court opinion, Case No. 687, October Term, 1946.) That this litigation was commenced on May 27, 1946, by the plaintiffs, subsequently formed into and acting herein as the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association, following said seizure by the defendants John H. Fahey as the Federal Home Loan Bank Commissioner and his appointee, A. V. Ammann, as the conservator for said Association, said Association having been at the date of seizure, May 20, 1946, a solvent institution having assets of approximately Twenty Six Million Dollars ($26,000,000.00), which said seizure followed by approximately two months the seizure of the solvent Forty Six Million Dollar ($46,000,000.00) Federal Home Loan Bank of Los Angeles by the defendant John H. Fahey, in which Federal Home Loan Bank said Association then had on deposit for safe-keeping government bonds alleged to exceed Five Million Dollars ($5,000,000.00) in value and in which Federal Home Loan Bank said association owned stock alleged to be in excess of Three Hundred Thousand Dollars ($300,000.00); and

(2) It further appearing that the plaintiffs were licensed by the State of California to act as such Shareholders' Committee under License No. LA-A 37621 issued pursuant to Chapter 784, Statutes of 1937, of the State of California, by the Department of Investments, Division of Corporations; and that said Shareholders' Committee have been authorized in writing, by more than a majority, to wit: approximately fifty-six percent (56%) of the shareholder-members of said Long Beach Federal Savings and Loan Association to represent them; and that Westover and Smith, as the attorneys for the plaintiffs, therefore represent more than a majority of the shareholders in said Association; and

(3) It further appearing that considerable additional litigation was carried on by the plaintiffs in conjunction with litigation herein referred to, including the representation of said Shareholders in numerous matters of Interpleader and Interventions during the course of which there has been deposited in the registry of this Court in excess of One Million Two Hundred Thousand Dollars ($1,200,000.00) in cash; and

(4) It further appearing that no objection of any sort whatsoever has been raised to the allowance of said fee and expense money by any shareholder or depositor-member, or any other private person, entity or corporation ultimately concerned in ownership interest of the assets and funds of said association. That the only objection made to said allowance of said money and the only application for Stay of Execution of said allowance has come from appellant Ammann and the other seizing defendant, after notice as required by the Federal Rules of Civil Procedure and after wide public notice of the hearing on said application having been given on special order of

court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid is money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947, make and enter its order allowing a partial interim allowance on account of attorneys' fees to the firm of Westover and Smith, plaintiffs' attorneys, in the sum of Fifty Thousand Dollars ($50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 ($1534.77) Dollars, and order the payment to the plaintiffs of the

sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947, is for convenience attached hereto, marked "Exhibit A,"[1] and the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947, and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three

---

[1] There were attached to this order denying application for stay of execution of order allowing attorneys' fees and expenses two Exhibits; Exhibit A being findings of fact, conclusions of law and order for interim partial allowance on account of expenses and attorneys' fees incurred by the plaintiffs, the Shareholders Protective Committee, prior to March, 1947; and Exhibit B being Order denying application for review by Three-Judge Court pursuant to Title 28, Section 792, U. S. C. A. Inasmuch as these exhibits are heretofore printed in the appendix at pages 49 and 61, respectively, we are not reproducing them in connection with the original order denying application for stay of execution.

court, by publication in two daily newspapers of the City of Long Beach, California, the city wherein said Association is located, and in one of the daily newspapers of the City of Los Angeles, California, the city wherein said hearing was had, and after the consideration of numerous and lengthy affidavits by lay persons and expert witnesses, and no contravailing factual matters having been presented in opposition; and

(5) It further appearing that the money from which said interim partial fees and expenses would be paid is money on deposit in the registry of this Court; and

(6) It further appearing that after said hearing and prior to the making of any formal order thereon, the defendants John H. Fahey and A. V. Ammann did petition the Supreme Court of the United States for a Writ of Prohibition and/or Mandamus and/or Injunction to prohibit and restrain the undersigned Judge from further acting on said application for fees and expenses; and

(7) It further appearing that the Supreme Court of the United States did in an opinion filed on June 23, 1947, deny said petition for a Writ of Prohibition and/or Mandamus and/or Injunction; and

(8) It further appearing that this Court in deference to the Supreme Court of the United States, having desisted from any further proceedings until after said decision by the Supreme Court, did on September 2, 1947, make and enter its order allowing a partial interim allowance on account of attorneys' fees to the firm of Westover and Smith, plaintiffs' attorneys, in the sum of Fifty Thousand Dollars ($50,000.00), and make its further order for the payment to said law firm of the sum of One Thousand Five Hundred Thirty Four and 77/100 ($1534.77) Dollars, and order the payment to the plaintiffs of the

sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,530.29) Dollars, as and for expenses incurred by them, all of such allowances relating to services and expenses incurred prior to the 1st day of March, 1947; and that a true and correct copy of said order of September 2, 1947, is for convenience attached hereto, marked "Exhibit A,"[1] and the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(9) It further appearing that the defendant A. V. Ammann did on the 8th day of September, 1947, file with this Court his Notice of Motion for a Review by said statutory three-judge court of said order and for a stay of execution thereof pending such review; and

(10) It further appearing that said Motion for Review came on for hearing on the 10th day of September, 1947, and having been denied and the application for a stay of execution thereon having been requested only in the event the application for review by said three-judge court be granted, said stay of execution fell with the denial of the application for review; and that a formal order was made and signed by the undersigned on September 10, 1947, entitled "Order Denying Application for Review by Three

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Judge Court Pursuant to Title 28, Section 792, U. S. C. A.," a true and correct copy of which is for convenience attached hereto, marker "Exhibit B," the findings and conclusions therein are incorporated herein by reference with the same force and effect as though the same were herein set forth in full; and

(11) It further appearing that the bulk of the litigation thus far has had to do with some of the legal and preliminary phases only thereof and that the principal factual and legal matters which may arise in or in conjunction therewith remain to be heard, and there is also to be determined the various issues raised by the respective cross-claims and interventions, and that the litigation is presently continuing, and unless the fees and expenses heretofore allowed be paid, the plaintiffs may be deprived of their rights to pursue the litigation to an ultimate judgment on the merits; and

(12) It further appearing that the assertion of the rights and claims by the plaintiffs did require and does require that they and counsel take an active part in the litigation and the incurring of enormous expense for the preparation of pleadings (which in this case have been voluminous), multitudinous court appearances, for the preparation and printing of records and briefs on appeal, and other incidents to litigation; that it presently appears that the within action was commenced and is maintained by the plaintiffs in good faith for the avowed purpose of protecting and preserving the rights, interests, assets and properties in said association of themselves and others similarly situated, and that due process of law for ultimate justice requires a trial and determination on the legal merits, or both legal and factual if the issues are not disposed of on the legal merits alone, and that in view of the

whole record and files herein it would amount to a denial of due process to compel plaintiffs to pay the expenses and counsel fees heretofore allowed or to compel plaintiffs and counsel to await the final determination of the issues of said litigation for the payment of said fees and expenses; and

(13) It further appearing that as found by the Supreme Court of the United States in their opinion filed on June 23, 1947 (*Ex parte* Fahey, 133 Miscellaneous, October Term, 1946), "an allowance of Fifty Thousand Dollars ($50,000.00) will hardly destroy a Twenty Six Million Dollar ($26,000,000.00) Association during the time it would take to prosecute an appeal." The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs"; and said Court therein denied said petition; and

(14) It further appearing that on September 10, 1947, the appellant A. V. Ammann filed a notice of appeal wherein the order and judgment of this Court for an interim partial allowance of attorneys' fees and expenses to March 1, 1947, for the plaintiffs, was appealed to the Ninth Circuit Court of Appeals and immediately thereafter the Motion on which this order is based was presented to the Court.

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

First: The application for stay of execution as to that part of the order and judgment allowing the sum of Fifteen Thousand Five Hundred Thirty and 29/100 ($15,-

530.29) Dollars, as expenses incurred for the period up to March 1st, 1947, by the plaintiffs, the Shareholder Members Protective Committee, is unconditionally denied;

Second: The application for stay of execution as to that part of the order and judgment allowing the sum of One Thousand Five Hundred Thirty Four and 77/100 ($1534.77) Dollars as expenses incurred for the period up to March 1, 1947, by the firm of Westover and Smith, attorneys for the plaintiffs, is unconditionally denied;

Third: The application for stay of execution as to that part of the order allowing the sum of Fifty Thousand ($50,000.00) Dollars as an interim partial allowance on account of attorneys' fees for services rendered prior to March 1, 1947, to the firm of Westover and Smith, as attorneys for the plaintiffs, Shareholder Members Protective Committee, is denied upon condition that the said firm of Westover and Smith file with the Clerk of this Court a Surety Bond in a form approved by this Court, conditioned that the said firm will obey any final judgment as to the disposition of the said sum of Fifty Thousand Dollars ($50,000.00), paid pursuant to the order of this Court, and upon the filing of said bond as approved, the Clerk of this Court is ordered and directed to pay to the firm of Westover and Smith from the funds on deposit in the registry of this Court the sum of Fifty Thousand Dollars ($50,000.00).

Fourth: Pursuant to stipulations entered into in open Court, and entered by the Clerk in the minutes of this Court, by and between James M. Carter, United States

Attorney, by Ronald Walker, Assistant United States Attorney, and by Ray E. Daugherty, Associate General Counsel for the Home Loan Bank Board, on the one hand, and Wyckoff Westover, Esquire, of the firm of Westover and Smith, on the other hand;

It Is Hereby Ordered that the Clerk of said Court make such payments to the said firm of Westover and Smith of the said sum of Fifty Thousand Dollars ($50,000.00) and to plaintiffs and said attorneys of the said sum of Seventeen Thousand Sixty-five and 06/100 Dollars ($17,-065.06), only upon the occurring of either of the following events:

1. The expiration of 10 days from the date of the signature of this Order without the filing with the Clerk of this Court of notice that appellant has applied to the Ninth Circuit Court of Appeals, or to a Justice thereof, for a stay of execution of said order; or

2. If such notice be so filed within said 10 days, then the filing with the Clerk of this Court of a notice from the Ninth Circuit Court of Appeals, or from a Justice thereof, that application for a stay of execution made to said tribunal, or a Justice thereof, by said appellant, has been denied.

Dated at Los Angeles, California, this 30th day of September, 1947.

/s/ Peirson M. Hall,
PEIRSON M. HALL,
Judge.

Approved as to form:

.....

CHARLES K. CHAPMAN,

Attorney for Long Beach Federal Savings and Loan Association.

THOMAS AND WALLACE,

By .....

H. O. WALLACE,

Attorneys for Title Service Company.

.....

RAYMOND TREMAINE,

Attorney for Robert H. Wallis.

O'MELVENY AND MYERS,

By .....

PIERCE WORKS,

.....

RICHARD FITZPATRICK,

Attorneys for Federal Home Loan Bank of Los Angeles.

Service of the foregoing order acknowledged this..... day of September, 1947, at.....P. M. ....., Assistant U. S. Attorney, attorney for defendant Ammann.